IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3785 OF 2005

Shri Ambrish B.Doshi. ..Applicant.

V/s.

The State of Maharshtra. ..Respondent.

Mr.Subodh Desai, for applicant.

Ms.G.P.Mulekar, APP for State.

Mr.M.K.Kocharekar, for respondent No.2.

CORAM: A.M.KHANWILKAR,J

DATE : NOVEMBER 23, 2005.

P.C. :

1. Heard counsel for the parties.

2. Rule. Rule made returnable forthwith by consent.

3. Mr.Kocharekar waives notice for respondent No.2. Mrs. Mulekar, APP waives notice for respondent No.1. By consent matter is taken up for final disposal forthwith.

4. Short question that arises for my consideration is whether the course adopted by the trial judge in order dated 23rd April, 1998

permitting the investigating officer to proceed to file charge sheet by giving permission under section 155(2) of the Cr.P.C. in relation to the offence punishable under section 138 read with 142 of Negotiable Instruments Act can be sustained.

5. Briefly stated, the respondent No.2 filed complaint before the Additional Chief Metropolitan Magistrate, 9th Court, Bandra, which was registered as 421/P/1998 and 832/SS/2005. In the said complaint, the respondent No.2 had alleged that the petitioner is liable to be proceeded for offence punishable under section 420 of the Indian Penal Code as well as Section 138 of the Negotiable Instrument Act. In the backdrop of the allegations in the complaint following prayer was made in paragraph-20 which reads thus :

> ". I, therefore, pray that detailed Investigation and inquiry being necessary, this Hon'ble Court be pleased to send the papers for inquiry and report under Section 156(3) of the Cr. P.C. I also pray that this Hon'ble Court may be pleased to issue process against the accused under Section 138 of the Negotiable Instruments Act and also

under Section 420 of Indian Penal Code and he be tried according to law."

6. Pursuant to said complaint, the trial Judge directed the Kherwadi Police Station to undertake enquiry and submit report under section 156(iii) of the Cr.P.C.. In terms of that directions, Sr.Inspector of Police of Kherwadi Police Station submitted report on 23rd April, 1998, making it amply clear that no offence under section 420 was detected. In the fact situation of the present case, he however, opined that material collected during the enquiry would indicate that offence under section 138 r/w 142 of the Negotiable Instrument Act, 1981 was committed by Ambrish B. Doshi, proprietor of Aarti Chem.Corporation. On that finding, the investigating officer requested the trial Judge to grant him permission under section 155(2) of Cr.P.Code to file charge sheet in relation to the said offence against Ambrish Doshi. On this report the trial Judge has passed order dated 23rd April, 1998 in the following terms.

"I.O. Shri Deshmukh, P.I. of Kherwadi Police Station present.

Perused the papers. Permission prayed for investigation u/section 155(2) Cr.P.C. is granted.

I.O. is further directed to take necessary steps and submit report as early as possible considering the property, cash involved in this case is Rs.1,05,00,000/- and submit report within one month."

7. The question before me is whether it was open to the trial Judge to grant such permission under section 155(2) of the Code. Counsel for the petitioner has placed reliance on Section 142 of Negotiable Instrument Act, 1881 which postulates that no court shall take cognizance of offence punishable under section 138 N.I.Act except upon complaint in writing made by the payee or holder in due course of the cheque as the case may be. As this provision is non-obstante clause, obviously therefore, the question of permitting Investigating Officer to file charge sheet and prosecuting the accused for offence under section 138 of N.I.Act, 1881 does not arise. Viewed in this perspective, to that extent the order dated 23rd April, 1998 will have to be set aside.

8. That however, does not mean that the complaint which is already filed by the respondent No.2, which was registered as Case No.421/P/1998 and 834/SS/2005 cannot proceed. On the other hand, the said complaint will have to be taken to its logical end, as private complaint is filed in writing by the payee before the competent court in accordance with the law. Accordingly, this application would succeed to the above extent.

9. As the complaint pertains to year 1998 the concerned court will be well-advised to proceed with the same as expeditiously as possible.